

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

JOSE GAXIOLA,

Petitioner,

vs.

JACK PALMER, *et al.*,

Respondents.

3:06-cv-0516-BES-RAM

ORDER

This action is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by pro se petitioner Jose Gaxiola, a Nevada prisoner. Before the Court is respondents' motion to dismiss (docket #10).

**I. Procedural History**

On June 20, 2003, after a jury trial, petitioner was convicted of five counts of sexual assault with a minor under the age of fourteen (counts I-V) and two counts of lewdness with a child under the age of fourteen (counts VI-VII). Petitioner's Exhibit A.<sup>1</sup> The District Court for Clark County sentenced petitioner to life imprisonment with the possibility of parole after twenty years for counts I-V, with the sentences for counts II-V to run concurrently to count I,

---

<sup>1</sup> The exhibits cited in this order in the form "Exhibit \_\_\_\_," are those filed by respondents in support of their motion to dismiss, and are located in the record at docket #10. The exhibits cited in this order in the form "Petitioner's Exhibit \_\_\_\_," are those filed by petitioner in support of his habeas petition, and are located in the record at docket #1.

1 and to life imprisonment with the possibility of parole after ten years for counts VI-VII, with  
2 count VII to run consecutively to count I. *Id.* The court entered a judgment of conviction on  
3 September 25, 2003. *Id.*

4 Petitioner appealed to the Nevada Supreme Court, alleging (1) the trial court erred in  
5 allowing four witnesses to testify to hearsay under NRS 51.085, which is unconstitutional as  
6 it violates petitioner's right to confrontation under the Sixth and Fourteenth Amendments; (2)  
7 jury instruction number nine, which informed the jury that no corroboration of the victim's  
8 testimony was necessary to convict, was given in error; (3) the two lewdness convictions  
9 should be stricken as they were incidental to the sexual assaults; (4) the prosecutor committed  
10 several instances of prosecutorial misconduct; (5) the admitting and then striking of prior bad  
11 act evidence was prejudicial; (6) the trial court erred when it refused to order a psychological  
12 examination of the victim; and (7) the trial court erred in failing to suppress the petitioner's  
13 statement as he was not given his *Miranda* warnings. Exhibit 1.

14 The Nevada Supreme Court affirmed the convictions for counts I-V and reversed the  
15 convictions for counts VI-VII. *Id.* The trial court entered an amended judgment of conviction  
16 on November 21, 2005. *Id.* Petitioner then filed a state habeas corpus petition, alleging eight  
17 claims of trial court error that were not raised on direct appeal and one claim of ineffective  
18 assistance of counsel. Petitioner's Exhibit B. The district court denied the petition, and the  
19 Nevada Supreme Court affirmed the denial on appeal. Petitioner's Exhibits A and B.

20 Petitioner mailed his federal habeas corpus petition on September 27, 2006 (docket  
21 #1). Respondents moved to dismiss the petition, alleging several grounds contained in the  
22 petition are unexhausted, and one ground fails to state a claim for federal habeas corpus relief  
23 (docket #11). Petitioner opposes the motion to dismiss (docket #12).

## 24 **II. Petitioner's Motion for Appointment of Counsel**

25 After filing his opposition to respondents' motion to dismiss, petitioner filed a motion for  
26 appointment of counsel (docket #13).

1        There is no constitutional right to appointed counsel for a federal habeas corpus  
2 proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999 F.2d  
3 425, 428 (9th Cir. 1993). The decision to appoint counsel is generally discretionary. *Chaney*  
4 *v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.  
5 1984). However, counsel must be appointed if the complexities of the case are such that  
6 denial of counsel would amount to a denial of due process, and where the petitioner is a  
7 person of such limited education as to be incapable of fairly presenting his claims. See  
8 *Chaney*, 801 F.2d at 1196; see also *Hawkins v. Bennett*, 423 F.2d 948 (8th Cir. 1970).

9        The petition and opposition on file in this action are organized and raise the issues in  
10 a clear and understandable manner. It does not appear that counsel is justified in this  
11 instance. The motion shall be denied.

### 12 **III. Motion to Dismiss**

#### 13 **A. Exhaustion of Claims**

14        A state prisoner must exhaust all available state remedies prior to filing a federal  
15 habeas corpus petition. 28 U.S.C. § 2254(b); *Rose v. Lundy*, 455 U.S. 509 (1982). The state  
16 courts must be given a fair opportunity to act on each claim before those claims are presented  
17 in a habeas petition to the federal district court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844  
18 (1999). Furthermore, a claim will remain unexhausted until a petitioner has sought review from  
19 the highest available state court through direct appeal or collateral review proceedings. See  
20 *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004).

21        A habeas petitioner must “present the state courts with the same claim he urges upon  
22 the federal court” in order to allow a state court to correct violations of federal rights. *Picard*  
23 *v. Connor*, 404 U.S. 270, 276 (1971); *Duncan v. Henry*, 513 U.S. 364, 365 (1995). The federal  
24 constitutional implications of a claim, not just issues of state law, must have been raised in the  
25 state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988)  
26 (citing *Picard*, 404 U.S. at 276)). To achieve exhaustion, the state court must be “alerted to

1 the fact that the prisoner [is] asserting claims under the United States Constitution.” *Duncan*,  
2 513 U.S. at 365-66. See also *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9<sup>th</sup> Cir. 1999) (stating the  
3 “mere similarity between a claim of state and federal error is insufficient to establish  
4 exhaustion”).

5 Furthermore, a claim is not exhausted unless a petitioner has fairly presented to the  
6 state court the same operative facts and legal theory upon which his federal habeas claim is  
7 based. *Tamalini v. Stewart*, 249 F.3d 895, 898 (9th Cir. 2001) (citing *Bland v. California Dept.*  
8 *of Corrections*, 20 F.3d 1294, 1295 (9th Cir. 1982), *overruled on other grounds by Schell v.*  
9 *Witek*, 218 F.3d 1017 (9th Cir. 2000) (*en banc*)). Exhaustion is not met if a petitioner presents  
10 to the federal court facts or evidence which place the claim in significantly different posture  
11 than it was in the state courts, or where different facts are presented to the federal court to  
12 support the same theory. *Conrotto v. Newland*, 188 F.3d 512 (9th Cir. 1999); *Nevius v.*  
13 *Sumner*, 852 F.2d 463, 470 (9th Cir. 1988).

#### 14 **1. Ground Two**

15 In petitioner’s second claim for relief he alleges that the trial court improperly gave a jury  
16 instruction stating that no corroboration of the victim’s testimony was needed to convict him  
17 of sexual assault, in violation of his Fifth, Sixth and Fourteenth Amendment rights to due  
18 process, a fair trial and confrontation. In the motion to dismiss respondents argue that  
19 petitioner presented this claim to the Nevada Supreme Court on direct appeal, but raised state  
20 law violations and not federal law violations. Petitioner contends that this claim is exhausted  
21 as it presents the same facts that were presented to the Nevada Supreme Court.

22 While the same facts were presented to the Nevada Supreme Court, in order to  
23 exhaust a claim, the state court must be “alerted to the fact that the prisoner [is] asserting  
24 claims under the United States Constitution” and given the opportunity to correct alleged  
25 violations of the prisoner’s federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995). See  
26 also *Fields v. Waddinton*, 401 F.3d 1018, 1021 (9th Cir. 2005); *Hiivala v. Wood*, 195 F.3d

1 1098, 1106 (9<sup>th</sup> Cir. 1999). “The mere similarity between a claim of state and federal error is  
2 insufficient to establish exhaustion.” *Hiivala*, 195 F.3d at 1106. Petitioner made no  
3 freestanding substantive federal claim to the Nevada state courts that his right to due process,  
4 a fair trial and confrontation were violated. Rather, petitioner argued to the Nevada Supreme  
5 Court on direct appeal that the jury instruction was improper under Nevada state law. Ground  
6 two of petitioner’s federal habeas petition is unexhausted.

## 7 **2. Ground Four**

8 Petitioner alleges in his fourth claim that his Fifth, Sixth and Fourteenth Amendment  
9 rights to due process, a fair trial and confrontation were violated by the trial court’s admittance  
10 and then striking of prior bad act evidence. Respondents assert that this claim was raised in  
11 the Nevada Supreme Court as a violation of NRS 48.045, and as such remains unexhausted.

12 Respondents’ contentions are correct. Petitioner raised this claim on direct appeal but  
13 did not include in his argument any United States Constitutional violations. As the Nevada  
14 courts were not alerted to or given an opportunity to correct the federal law violations, ground  
15 four is unexhausted. *Duncan*, 513 U.S. at 365; *Hiivala*, 195 F.3d at 1106.

## 16 **3. Ground Five**

17 Petitioner argues in his fifth ground for relief that the trial court violated his Fifth, Sixth  
18 and Fourteenth Amendment rights to due process, a fair trial, and confrontation when it  
19 refused to order a psychological evaluation of the victim. Again, respondents argue that this  
20 claim is unexhausted as it was presented to the state courts as a state law claim rather than  
21 a federal law claim.

22 In the opening brief to the Nevada Supreme Court on direct appeal petitioner did assert  
23 the same claim containing the same operative facts. However, petitioner did not assert that  
24 any federal right had been violated, and only cited to Nevada Supreme Court case law.  
25 Therefore this ground remains unexhausted as petitioner did not alert the Nevada courts to  
26 the alleged federal law violations. *Duncan*, 513 U.S. at 365; *Hiivala*, 195 F.3d at 1106.

1 **B. Sufficiency of Ground Six**

2 In ground six petitioner alleges his Fifth, Sixth and Fourteenth Amendments rights were  
3 violated when the trial court failed to suppress his statement after the police failed to read him  
4 the required *Miranda* warnings. Respondents argue that petitioner fails to state a claim as it  
5 is conclusory and self-defeating as petitioner concedes that his statement was not a custodial  
6 statement.

7 Petitioner raised this claim to the Nevada Supreme Court on direct appeal, and did  
8 argue that his federal rights under *Miranda* were violated. The Court has reviewed ground six  
9 in its entirety and the Court is not persuaded that ground six fails to state a claim for relief, or  
10 that it is conclusory. Petitioner properly exhausted this claim and clearly articulates federal  
11 constitutional bases for the ground.

12 **C. Petitioner's Election**

13 The Court finds grounds two, four and five are unexhausted in state court.  
14 Consequently, the Court finds the petition in this action to be a "mixed" petition – one  
15 containing both claims exhausted in state court and claims not exhausted in state court.  
16 Under the circumstances, the Court will require petitioner to make an election. Petitioner must  
17 do one of the following: (1) abandon the unexhausted claims (grounds two, four and five), and  
18 proceed only on the exhausted claims (grounds one, three and six); or (2) move for a stay of  
19 this action, pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), so that he may return to state  
20 court and exhaust his unexhausted claims.

21 In *Rhines*, the Supreme Court placed limitations upon the discretion of district courts  
22 to facilitate habeas petitioners' return to state court to exhaust claims. The *Rhines* Court  
23 stated:

24 [S]tay and abeyance should be available only in limited circumstances. Because  
25 granting a stay effectively excuses a petitioner's failure to present his claims first  
26 to the state courts, stay and abeyance is only appropriate when the district court  
determines there was good cause for the petitioner's failure to exhaust his  
claims first in state court. Moreover, even if a petitioner had good cause for that  
failure, the district court would abuse its discretion if it were to grant him a stay

1 when his unexhausted claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2)  
2 (“An application for a writ of habeas corpus may be denied on the merits,  
3 notwithstanding the failure of the applicant to exhaust the remedies available in  
4 the courts of the State”).

5 544 U.S. at 277. In view of *Rhines*, if petitioner wishes to return to state court to exhaust his  
6 unexhausted claims, he must make a showing of good cause for his failure to exhaust his  
7 claims, and he must show that his claims are not plainly meritless.

8 **IT IS THEREFORE ORDERED** that petitioner’s motion for appointment of counsel  
9 (docket #13) is denied.

10 **IT IS FURTHER ORDERED** that respondents’ motion to dismiss (docket #10) is  
11 **GRANTED IN PART AND DENIED IN PART**. The court finds that grounds two, four and five  
12 are unexhausted.

13 **IT IS FURTHER ORDERED** that, no later than **June 10, 2008**, petitioner shall do one  
14 of the following: (1) file and serve a Notice of Abandonment of Claims, stating that he wishes  
15 to abandon grounds two, four and five, and proceed only on grounds one, three and six; or (2)  
16 file and serve a motion for stay, requesting a stay of this action, and attempting to make the  
17 required showing for such a stay, pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), so that  
18 he may return to state court and exhaust his unexhausted claims.

19 **IT IS FURTHER ORDERED** that, if petitioner files and serves a motion for stay,  
20 respondents shall have **30 days** to respond to such motion, and petitioner shall thereafter  
21 have **30 days** to reply.

22 ///

23 ///

24 ///

25 ///

26 ///

///

DATED this 12<sup>th</sup> day of May, 2008.

  
UNITED STATES DISTRICT JUDGE